

RACE OF DILIGENCE BETWEEN

WILSON

AND

BOLE

DATES
1908

1909

1910

1911

1912

1913

PATENT
ISSUED
1914

1915

Alleged to have Invented

BOLE NEVER DID ANYTHING DURING THIS ENTIRE PERIOD TOWARD REDUCING HIS ALLEGED INVENTION TO PRACTICE, BUT STOOD IDLY & SILENTLY BY & WITHOUT PROTEST, WHILE WILSON INDEPENDENTLY INVENTED, REDUCED TO PRACTICE & PROVED HIS, WILSON'S, INVENTION NEW & USEFUL IN THE ART

ESTOPPED

Wilson's Date of Invention

Wilson Manufactures & Sells the Invention Extensively within the Knowledge & Presence of Bole
Bole Selling the Wilson Invention Confirmed, in Plain Sight, within the Wilson Works
Bole Never Claiming the Invention or Protecting in any Way

First Patent to Wilson by Bole

Wilson Applies for Patent

Applies for Patent

PATENT OFFICE DECLARES INTERFERENCE BETWEEN WILSON & BOLE

PATENT ISSUED

PATENT OFFICE DECLARES INTERFERENCE BETWEEN WILSON & BOLE

UNITED STATES PATENT OFFICE

EXAMINER OF INTERFERENCES DECIDES IN FAVOR OF WILSON
BOARD OF EXAMINERS DECIDES IN FAVOR OF WILSON

No. 2641.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Wilson & Willard Manufacturing
Company, et al.,

Appellants,

vs.

Robert E. Bole, et al.,

Appellees.

APPELLANTS' REPLY BRIEF.

In accordance with stipulation between the parties and permission accorded counsel for appellants at the conclusion of argument, this reply brief is filed more particularly to reiterate contentions of law and fact contravened by counsel for appellees in appellees' brief and on argument, and to hold up to clear daylight the many amazing distortions of fact and record showing found in appellees' brief and put forth by argument.

First: *Burdens of proof heavy upon appellees and not supported by the record on their behalf, and Bole absolutely barred by estoppel and laches.*

In spite of the contentions of counsel for appellees to the contrary, the record in this case clearly supports contention of appellants that the three issues adverse to appellees, namely, want of novelty in the Bole patent, and want of diligence with respect to priority on behalf of Bole and want of originality of invention in Bole, were all consistently and elaborately put before the trial court, backed up and supported by the authorities which have been urged upon this appellate tribunal in appellants' brief and on argument. The trial judge appeared to ignore the weight and significance of the burdens imposed upon appellees, particularly by reason of the anticipatory fact of appellants' manufacture and sale for over twenty months prior to the signing of the Bole application, and further particularly for the reason that the Patent Office has decided the interference between Bole and Wilson pertinent to the matter of originality and priority of invention of the subject of the Bole patent in suit in favor of Wilson. Under the authorities cited in appellants' brief and adverted to upon argument, this double burden of proof is upon appellees, and was upon appellees at the trial and has been upon appellees since the case was at issue, the amended bill in this case having been filed more particularly to sharpen and define the issues whereby such burdens of proof were shifted and imposed upon appellees by the proof of such anticipatory fact and by the offer and acceptance

in evidence of the records of the interference proceedings in the Patent Office.

With such burdens of proof shifted to and imposed upon appellees, it matters little what slight and immaterial discrepancies there may be in the record as between the elaborate and convincing testimony of the numerous witnesses supporting the case of appellants.

APPELLEES' PROOFS ARE REPLETE WITH CONTRADICTION.

The significant and controlling feature of the controversy is that Bole is absolutely unsupported as to his alleged participation in any of the acts and performances putting into operation and effect the diligent assertive reduction to practice and manufacture by appellants in the early part of the year 1911, and, as we have previously alleged, Bole is totally unsupported by any corroboration as to his alleged disclosure of the invention to Wilson. If it cannot be found that he so disclosed the invention to Wilson, the appellants must prevail upon this appeal, inasmuch as it therefore results that Wilson was an original inventor, and further, inasmuch as it has been conclusively proved that he was the prior and diligent inventor, both in this case and in the interference proceeding, and further, inasmuch as the appellants' manufacture and sale anticipate the application of Bole by over twenty months.

The appellees have asserted and contended that this issue depends upon facts and not upon law. We radically and insistently contend that the determination of this issue depends more upon the proper application of

the law under the doctrine of *Morgan v. Daniels* as to the Patent Office adjudications on the issue of originality and priority between Bole and Wilson, and upon the doctrines of law whereby the burden of proof is in a twofold manner and degree shifted to and imposed upon appellees. In view of such imposition of twofold burden of proof, the unsupported word of a discredited, contradicted and animus-actuated party like Bole can not be accepted to establish appellees' contentions, particularly in view of all the surrounding circumstances of the case; because of the estoppel operative against Bole, because of his failure to protest against appellants' manufacture and sale, over four years after the date Bole alleges as the date of his conception of the invention, and further, and because of the estoppel, consisting in his covenant to put any claim to the invention of the issue away from him forever, and particularly in no manner to harass or interfere with the business or affairs of the appellant in and about this invention. The letter of January 17, 1913, written by Bole, required no explanation by appellants. It made an absurd assertion as to rights long forfeited by Bole by his concealment and abandonment of the invention, assuming, charitably, that he ever was in possession of it. The absurd contention of counsel for appellees that the appellants had been operating under a revokable license from Bole as to the invention prior to this letter of January 17, 1913, is beneath consideration, as Bole had no patent under which to grant such license, directly or impliedly, and on the contrary,

merely acquiesced, with all the estoppel against him attaching thereto, in the use of invention by the appellants if Bole had created it.

We reiterate that this case, upon the facts, the law, and equity, coming before this court *de novo*, cannot be found to support appellees' contentions in any material or considerable extent to sustain the findings of the trial court. The whole enterprise of appellees, of whom the party Double is deeply interested in other litigation against appellants, is one of spite, presumption and harassment; and the conspiracy between Double and Bole, which latter appellee rushed to Double as soon as he had made a niggardly settlement with appellant corporation, is such a barefaced conspiracy, and is to be so plainly read between the lines and in the lines of this case, that a court of equity can or should no longer tolerate its consideration with equanimity and withhold the complementary justice and equity which the appellants seek and deserve. Appellees' counsel has made many either wilful or careless misrepresentations with respect to the record and law in this case, which require detail treatment, in order that appellees in an attempt to prevail upon this appeal by dodging the real issues of burden of proof and controlling fact and law and equity, by means of such misrepresentation coupled with immaterial assaults upon strong record for appellants, may not be permitted to ride to victory in this case upon a nightmare.

APPELLEES' DESPERATE TACTICS.

We will now proceed to point out a number of these glaring discrepancies between the presentation by counsel for appellees on brief and argument, and the facts of the record and the law cited by appellants on brief and argument. These tactics of misrepresentation, misstatement and misquotation are to be marveled at as coming from one of the standing and ability at the patent bar of counsel for appellees, upon any other presumption than that his cause was found to be one of desperation. Even in that case the marvel does not cease, for this kind of generalship is so unavailing and reactive it is hard to understand how a man of any experience at all can adopt it. In other words, if a lawyer grinds up the very dry bones of his case to make food for argument, he still is utilizing material which can be assimilated and produces such strength as may correspond to the force values in the ground-up bones; but for one to so tacitly admit that no value remained in even the bones of the case, as counsel does by his process of transubstantiation of the dry bones of the case into an entirely new anatomical creation, bearing no resemblance whatever to its alleged prototype:—this is a process of strategic alchemy which no wise general would attempt, no matter how well founded his belief in the efficacy of feint, fright and bluster. The whole procedure is one too cheap and futile to be expected to come from any practitioner before this court, were not utter desperation behind it.

First referring to the pleadings side of the case, appellees have insisted that there are only two defenses

in this case, namely, that the defendant Wilson was the inventor of the invention covered by letters patent, and that the application for letters patent by Bole was fraudulent, and that the patent in suit was therefore void; and second, that as a part of the settlement of account between Bole and the defendants, Bole withdrew and waived any claim or right of invention with respect to the subject of the patent in suit and covenanted in no way to injure or damage the defendants with relation to the said invention. Counsel says that the further defense, namely, that the Bole letters patent are invalid for want of novelty at the time Bole made his application, was not a defense urged before the lower court, and not a defense involved in the pleadings. Upon the trial we read to Your Honors that portion of paragraph 5 of the amended and substituted answer wherein it sets up these defenses, and which was filed particularly to elaborate such defenses, such paragraph including the allegation that Wilson “was using reasonable diligence in adapting and perfecting said invention, and who was, with said defendant Wilson & Willard Manufacturing Company, on his own behalf, manufacturing and selling underreamers embodying said invention at Los Angeles, county of Los Angeles, state of California, in said Southern Division of said Southern District of California, all with the knowledge of and without protest of said complainant Robert E. Bole, for a period of over one year prior to said pretended invention by said Robert E. Bole and to the filing of said application for said pretended letters patent by said Robert E. Bole”; thus

we find the defense of want of novelty clearly set up in the answer, and under the decisions in appellants' brief, such as more particularly set forth at the end of page 114, and on page 115 of appellants' opening brief, *the burden of proof was shifted to the complainants to prove by convincing preponderance of evidence that Bole's invention was still earlier than that manufacture and sale took place. This is elementary patent law and will not require extended discussion before this court, and counsel's attempt to dodge this burden of proof as well as the burden of proof imposed upon complainants under the doctrine of Morgan v. Daniels, thoroughly discussed and applied in appellants' opening brief and on argument, should not avail him. This double or twofold burden of proof reduces the case to a simple proposition heretofore urged, namely, that if Bole is not found to have proven overwhelmingly and by convincing preponderance of evidence that he disclosed the invention of the patent in suit to Wilson before Wilson came originally into possession of such invention, the appellees must lose, and as to this it was not sufficient for the lower court even to believe Bole and coincidentally even to disbelieve all of Wilson's witnesses, if it did, for the circumstances surrounding the acts and relations of the parties are such as to preclude complainants from prevailing on any such unsupported testimony by Bole, by the doctrines of diligence, estoppel, concealment and laches, all treated of in appellants' opening brief. We wish to reiterate at this point our contention that although Bole can not be believed in his un-*

supported testimony as to disclosure to Wilson before January 26, 1911, because Bole is an impeached, contradicted, animus-actuated and uncorroborated witness, even conceding, for purpose of argument, that the lower court may have felt justified in believing him, appellees must lose on this appeal because the factors of estoppel, concealment, laches and want of diligence bar Bole from any equitable or legal right in the premises. Counsel for appellees made a point on argument to the effect that Bole, prior to January 17, 1913, when he wrote the insulting and preposterous letter to Wilson, had been permitting the appellants to operate under an implied license to use the key of the invention. This contention is absurd in law and in fact, inasmuch as prior to that time Bole had never claimed to Wilson to be the inventor of that key, and furthermore had not applied for any letters patent thereon, so that there was no right or monopoly, inchoate or vested, under which he could actually or impliedly license the defendants. Upon the hearing Your Honors made inquiry as to what explanation Wilson made of this letter and counsel replied that no explanation was made. In appellants' opening brief it is pointed out on page 14, at the top, that the trial judge prevented any such explanation being made by Wilson. No explanation was necessary, inasmuch as Wilson has testified that no such contention had been made by Bole prior to the date of that letter, and further, because of the fact that Bole's long acquiescence in the use of the key, even assuming he had any rights attaching to such key, absolutely estops Bole and both

of the appellees from the assertion of any claim as to such use or from protesting against the continuance of its use, for Bole sanctioned it by his permission if he in fact might have had any say about it whatsoever. It is shown that at the time of this statement Wilson pointed out to Bole that the letter of January 17, 1911, was the first intimation Wilson had ever dreamed of that Bole claimed any part whatever in the invention of that key. [Tr. p. 144.] If a patentee (and Bole was not then even an applicant for patent) permits with his direct knowledge, and under his very nose, the use for nearly two years of something he believes or claims he is the inventor of, and permits such user to incorporate such use into the very good will and substance of his business, the mildest application of the doctrine of estoppel will bar him from any subsequent contention that such use was unwarranted and without right. The Patent Office has so held in effect.

To return again briefly to the question of the defenses interposed in this case, and this counsel's contentions that the defenses presented to the trial court did not include the defenses of want of novelty, absurd as that contention is shown to be on the very face of the pleadings and on the very face of the record in which this question of prior manufacture and use is shown to have exhaustively been gone into. It may be illuminating to this court to read between the red ink lines of pages 67, 68, 69 and 77, Tr., which were portions of the record in the lower court ordered stricken out upon stipulation between the parties, to save ex-

pense of preparation of transcript on appeal, but which, nevertheless, found their way into the transcript. Upon these pages it is clearly seen that appellants contended and appellees realized and admitted that the question of prior use by defendants was before the trial court.

AS TO THE INADMISSIBILITY OF THE HEBER DEPOSITION

Victor Talking Machine Company v. Sonora Phonograph Corporation, 221 Fed. 676, was garbled in its meaning by appellees on argument.

Counsel for appellees stated before this court that in this cited case the motion to suppress was held to be brought too late and refused. This was not the ruling in that case at all. The perusal of appellants' opening brief, pages 23 to 26 inclusive, removes every shadow of doubt from the question of inadmissibility of the Heber deposition, the court in that eastern case holding that the defendant might have waited until the trial, and that even if laches was an answer ("which I doubt" there is none in this case). It was further held that defendant "might have waited until the trial," as appellants did in the case at bar, and the court held that it was the duty of the court on motion of the adverse party to suppress the deposition taken after the proper time, without application to the court for an order permitting such taking. We strenuously opposed the reception in evidence of this alleged deposition before the trial court, and the pages of the brief last referred to make clear the consistency of appellants in their position with respect to this deposition from the very time of notice of taking same on. It is

our contention there was no deposition taken, and that it would have been improper to give a color of sanction to the taking of such alleged deposition even by giving notice of motion to suppress before the trial. Without this Heber deposition the legendary doings in Maricopa in 1908 become reduced to the merest wraith out of the mouth of "Gus Adams" (Bole's hunting and poolroom chum) as found within the record. Rule 47, which is controlling as to this Heber alleged deposition procedure, clearly dominates rule 54, and there is no clash between these rules.

The double burden of proof imposed upon appellees looms still larger as an impossible burden with Heber eliminated. Even had Bole and his friends Heber and Adams had their little 1908 seance at Maricopa, that would not in any respect prove that Bole disclosed such invention to Wilson, and which Wilson stoutly denies. It is not even contended that such disclosure was until along the middle of January, 1911, and it is significant that it was in this month that Wilson has proven he got busily under way and worked out the invention in connection with his larger and stronger tee himself. Everything that Bole claims he does is tied onto the tail of Wilson's procedure. Outside of the 1908 legend Bole does not make a single independent move in his proofs. His entire case is an attempt to tag onto Wilson and to ride him into a favorable position with respect to this invention. This is strikingly evidenced by Bole's attempt to make it appear that there was an earlier thinner key made for the Wilson reamer than that made for reamer 120 by Rydgren, who says

he made all of the first keys for the Wilson reamers and that there was no such thin key among them. We have shown that Bole admitted his falsehood in such testimony, as per second paragraph, page 43, appellants' opening brief.

AS TO E. C. WILSON AND THE AGREEMENT OF SETTLEMENT WITH BOLE OF FEBRUARY 1, 1913.

Counsel for appellees on the hearing stated that Wilson in this case denied there was a written agreement covering such statement and was forced to admit it upon its production with his name thereon as a witness. We have endeavored in vain to find any such proofs in the record. Wilson in fact testifies [Tr. p. 144] that he dictated that very agreement. What can this court say as to this attempt to impeach Wilson by assertions not only unsupported by the record but absolutely disproven by the record?

The reason that appellees are so desperate, as shown by these tactics, is because they realize that this court must disbelieve all of appellants' witnesses and absolutely believe each and every one of appellees' witnesses, in order to find for Bole in any particular in this case. Bole unsupported can not be believed for the reasons exhaustively pointed out, and if his witnesses are believed and he is thus bolstered up, he still cannot win on the priority side of the case, nor on novelty, because of the anticipatory fact of the applicants' manufacture; nor on the original side of the case, for nobody is brought forth to testify that they heard Bole disclose this key invention to Wilson

before Wilson's activity commenced. Even Naphas, who is supposed to have been present when such disclosure was made as alleged, is not asked about it. Appellees, can only hope to tear down each and every one of appellants' witnesses in order to make any kind of quasi impression upon this court. The impregnability of appellants' case is only emphasized by the methods appellees employ to attack it. As theretofore pointed out, the defendants are men of high standing in the community as to business ability as well as intellectually (and we now, of course, refer to the brothers Wilson, the active officers and owners of the defendant corporation). No showing is made to this court that any one of appellees' witnesses is more than a wage-earning mechanic; and while we have all respect for wage-earning mechanics, it is to be borne in mind that these particular wage-earning mechanics are all either close friends and chums of Bole or a former wage-earner (in the case of Naphas) in Bole's former pump department of the defendants' business. Bole himself is a graduate mechanic, reared and helped to the front by Wilson; and the point we wish to make as to the vocations of Bole and all his witnesses is this, namely, that they are all or have been fellow-workers or chums, having every inclination to hang together in an attempt of one of their number to wreak vengeance upon his former duped creditor and employer. Such conspiracies are found in all vocations and walks of life, but the vocations of all these men being the same, and friendship aiding, it is clear to see how the Bole-Double conspiracy was worked up

and put into effect. Bole was able to lay the 1908 scene for history "manufacture" at Maricopa, where his two mechanic chums, Heber and Adams, stood ready to help him out with testimony after the alleged fact; and with Naphas on his side as a foreman in his Los Angeles business, he was able to make such attempts, feeble as they were, to show some connection with the Wilson activity in 1911. We respectfully submit this version of Bole's machinations, backed up by Wilson's competitor Double's willing co-operation, as the motif of the whole complainant performance.

A significant admission by counsel for appellees on the hearing, which is, of course, made necessary by the record, was to the effect that Wilson held the sketch Wilcox and W. W. Wilson saw at the conference of February 3, 1911, or thereabouts. *If Bole made such a sketch at that time or made that sketch, why didn't somebody see Bole with it, or see him make it? Again we put the query why Bole gave no version of this occurrence at which he says he was present, for he is proven to have been present by the unimpeached testimony of three witnesses, and his presence at that conference is circumstantially proven by the fact that it was his suggestion there made to "pry up the key" that was first adopted and found to be of no utility, and furthermore, because his alleged sketch of January 27, 1911, is of a key remover for prying up the key. Why didn't Bole at that conference disclose to Wilson the wedging up of the key and driving it out, which is what he and the Maricopa witnesses say was*

disclosed by him in 1908? Why did Bole disclose an unadopted method of key removing if he knew of a better method and of in fact the method which Houriet had to teach the shop after this conference? At this point let us show how counsel for appellees in his brief has garbled the record about this matter of removing the key and Houriet's connection with it, in an attempt to make it appear that Bole had something to do with removing it. *Appellees state*, page 47 of the brief:

“Mr. Houriet asserts that he should judge he put in and took out the key two or three times by means of a cape chisel before he called Mr. Knapp's attention to it, and leaves, as the result of his testimony in response to the court's questions, the impression at last that he never succeeded in removing the key in any other manner.”

Now, Houriet does not testify that he removed the key at any time by means of the cape chisel. Houriet's testimony [Tr. p. 691] in this respect is as follows:

“Q. How many times did you take it out and put it in before you called Knapp's attention to it? A. Well, I should judge I took it out two or three times. At first I tried it with a chisel and then I picked up a file there, and I said, 'Anything that is tapered like that is good to take it out.'”

This is important, because this whole matter of key-removing involves Houriet's discovery of *wedging* up the key and then driving it out, which is a very different thing from *prying* it up and driving it out, which

was Bole's suggestion to Wilson and which was found to be impracticable, and the means for which purpose disclosed in Bole's Exhibit January 27, 1911, Sketch in evidence, was found to be inoperative and of inutility in court at the final hearing of this case, as pointed out on argument. This sketch is in evidence as Complainant's Exhibit E, the original of same having, as Your Honors will remember, been forwarded by the Patent Office for the consideration of this appellate court.

Proceeding further with the calling of attention to the outright inconsistency between appellees' brief and the record and facts we quote again from that brief, *page 16*, to-wit:

"It is shown that both Mr. Wilson and Mr. Bole were making sketches before any of the witnesses observed anything of this conversation or heard anything of it."

There is no such showing on the record whatsoever. The witness Wilcox testifies, [Tr. p. 248,] that Wilson had a piece of yellow paper in his hand and a pencil. This is the nearest resemblance in the record we find to any such occurrence, in that it refers to a pencil, and that only in Wilson's hand. Wilcox again testifies [Tr. p. 253] that he did not see the parties concerned doing anything at the shipping desk and they all had their backs to him. This testimony similarly contradicts the statement of the appellees' brief on *page 18*, "that both E. C. Wilson and Mr. Bole had pencils in their hands and were making a sketch." Wilcox testifies, [Tr. p. 260] that,

“I am not positive that Mr. Bole had a pencil in his hand. It is possible that he had. I will not say that he didn’t have, and I will not say that he did, but I am positive that Mr. Wilson had a pencil in his hand, and he tapped the paper something like that,” (illustrating).

We search in vain for any part of the record which supports the statement that Bole made any sketch whatever at this conference.

Appellees’ brief likewise states, *page 19*:

“If then reliance is to be given to the testimony of the defendants’ witness, Wilcox, that the sketch was made at the shipping desk, it is apparent that Mr. W. W. Wilson can know nothing as to who made the sketch.”

This same testimony of Wilcox, top of page 253 of the record, absolutely refutes any such statement by counsel for appellees. If this statement of counsel is supposed to be a quotation of the testimony or of the substance of anything in the testimony, it is an untrue statement, for there is no such testimony. No witness in this case has stated that Wilson made any sketches at that desk, and certainly Wilcox does not say that any sketch was made at that shipping desk. The appellees are such carping critics of the testimony of appellants’ witnesses if perchance their words reflect a variance of two or three strides in the rear of the defendants’ shop, as applicable to shifting from the positions they may have assumed at one portion of the general get-together talk to another portion thereof,

that it is very interesting to note that Bole is not sure whether it was 1911 or 1913 that he performed his alleged trick of removing the key. (See appellees' brief, bottom of *page 52*, top of *page 53*.)

Referring again to appellees' brief, bottom of *page 57*, top of *page 58*, that Wilson is forced by the production of the Kibele letter to change his testimony and place the time of Houriet's alleged discovery prior to the date of that letter, this is not borne out by the testimony of Wilson [Tr. p. 161], and is an absurd observation anyway, inasmuch as the Kibele letter [Tr. p. 153] puts Wilson on record as having written under date of February 28, 1911, "either end can be pried up with a screw driver or coal chisel, and can be driven right out." Now, this was some twenty-five days after Bole had said this could be done at the conference, and Wilson was adopting what Bole had suggested. It may have been that day or a week or two weeks later that Houriet made his discovery, but it is evident that it was not made at that time or Wilson would have told Kibele that the key could be wedged up and pried out, which is what Houriet discovered. Wilson was simply taking the foolish and useless teaching of Bole, which was all that Bole ever taught about this key, and that concerned its use and not its production. Furthermore, the record shows that Wilson realized the key could somehow be pried up, and there was a lever in the shop which could do it and which did do it, and one of which was shipped with the first single-piece key reamer sent out. [Tr. p. 766.] Where is Wilson shown to have changed his testimony

as to this matter? This is a vital matter from appellees' standpoint, inasmuch as Bole tries to ride into this issue on the nightmare of an improper method of key-removing.

The deviousness of assertions of counsel for appellees in this case is only of a piece with that of his own witnesses, as, for instance, that of Bole himself, as quoted from bottom of *page 62*, appellees' brief, to the effect that this description was not among the written matter. That Bole in another place in his testimony said the description *was* among the written matter is a fact, as per his answer to question 40, p. 592, Tr.: "As I went along in the letter, I described the new style reamer and with each description I drew a sketch." This testimony, of course, is denied by both Willard and W. W. Wilson. Appellees state (p. 67, brief) that Bole's testimony is corroborated as to the mailing in to defendants the order for the modified reamer embodying the invention in issue, as they put it. There is no such corroborating testimony, and Adams, Bole's own witness and chum, testifies that he did not see Bole make out any order or mail it on the day that he took the reamer order at Maricopa in September, 1908, [see Tr. p. 634], as follows:

"Q. And you didn't see him send an order off for a reamer that night, did you? A. No, sir.

"Q. Didn't see him make out any? A. No, sir.

"Q. Did you talk about a reamer that evening? A. We did not.

"Q. You didn't see him make out an order at all on that day or on that trip? A. I did not."

This order was filled by a regular Wilson stock reamer, all as we have referred to in our opening brief.

Again, we state that counsel's assertion, on *page 75*, that Wilson ever insisted a single-piece key could not be removed by driving the tang end of a file under the key is made out of whole cloth. There is no such testimony in the record, and this is an untruthful statement.

Again, on *page 95* of appellees' brief it is stated that the court held and was thoroughly convinced that Mr. Bole was the inventor and had disclosed the invention to Mr. Wilson. There is no such showing in the record, and the opinion of the trial judge, quoted at length on pages 7 to 9, inclusive, appellants' opening brief, fails utterly to set forth any such holding on the part of the court. This is one of the singular aspects of the decision, namely, that, as we have pointed out in our opening brief, such strong and positive conclusions are reached upon such unsupporting bases of reasoning and finding.

Further, counsel would make it appear that the date of the invention of the issue, or at least as far as Wilson is concerned, should be found to be February 3, 1911, particularly inasmuch as he is desirous of making it out that Bole disclosed this to Wilson on or about that date. We have pointed out in our opening brief that Wilson testified he made the sketches, including the single-piece key, which sketches were disclosed to W. W. Wilson, Wilcox and Bole at the February 3rd conference, some time before that conference.

This is corroborated by W. W. Wilson, who testifies [Tr. p. 272]:

“As I remember it, I asked Mr. Wilson whether or not he would use the same kind of a key he used in the old reamer; and he said No, he was going to get one up with a single piece. He thought it would not give the trouble of wedging against the plug.”

It will be seen that the date of this talk must have been on the 26th of January, 1911, when the Pacific Iron Works order for the 12½-inch tee was received. The further testimony of Willard [Tr. p. 300] and of Wilson, analyzed in appellants' opening brief, thoroughly corroborates Wilson as to his production of this invention prior to this conference of February 3rd.

Appellees' Brief, page 13:

“There is no pretense on the part of defendants that at any other time Mr. Wilson was the original inventor or that he made and used underreamers embodying the invention without Mr. Bole's knowledge.”

Wilson *docs claim* to be the original *inventor* prior to that time. See his testimony [Tr. p. 104]:

“The idea of the single-piece key had occurred to me on many occasions before this order was made up, namely, before February 3, 1911. As early as 1906 or seven I had devised this 2-piece key type, and in designing that type of reamer different ideas of single-piece keys had occurred to me, * * *”

See also testimony [Tr. p. 105]:

“We went over them very carefully at that time, January 26, 1911, and I then made up my mind that it

was possible to make a single-piece key which might overcome a few of the minor troubles we had had with the double-key type. * * * I made sketches of them, and thought them over and studied over them at home, and I could not determine in my own mind which was the better form of those keys to try out first in this new type of reamer.”

The testimony likewise last above referred to corroborates all this.

Appellees’ Brief, page 15:

“That no such conference was called and that Mr. E. C. Wilson is drawing upon his imagination that he called such a conference for such purpose is established beyond the peradventure of doubt.”

We have above pointed out how conclusively it has been established as a matter of history that this conference took place. Willard has stated that there were many similar conferences or discussions and therefore it was hard for him to remember any one of them in particular. [See his testimony, Tr. p. 322.]

Appellees’ Brief, page 16:

So also here again, to advert to the question of burden of proof in this case, counsel says:

“The burden of proving that E. C. Wilson made that sketch and made it as his independent conception of this invention rests upon the defendants.”

We have shown beyond a shadow of doubt that legally the entire burden of proof was shifted to appellees by the anticipatory fact of Wilson’s manufacture. That burden can not be shifted back to appel-

lants until it has been carried to the end of the trial by appellees. Therefore, it was not incumbent upon Wilson to make out an earlier date of invention than that of the order of February 3, 1911, but rather the burden is upon complainants to show that Bole independently invented the subject of the patent and disclosed it to Wilson before that time. This Bole has utterly failed to do, as we have previously pointed out. Even if he did, we insist that, upon the very contentions of appellees they are absolutely barred in this case by estoppel as operating against Bole.

Appellees' Brief, page 16:

“He is impeached by the testimony of his own witnesses as to the alleged calling of such conference.”

A most remarkable situation has developed in this case, particularly on the argument and as shown by the general trend of appellees' brief, namely, that while appellees' counsel as an act of grasping at straws, attempts to tear to pieces the doings at the conference of February 3, 1911, while for that purpose tacitly admitting that conference as an actual occurrence, the complainant Bole, testifying on his own behalf, has insisted that no such conference took place. Therefore, counsel is in effect admitting that his own witness-appellee is untruthful and in error, which is an act of automatic impeachment requiring no further comment. Bole is the only party alleged to have been present at that conference who denies that such a conference or meeting was held. All of the other witnesses, even including Willard and Knapp, either admit that there

was such a conference or general discussion or merely state their failure to recollect same. How significant it is that appellee Bole is the only person contending that there was no such conference, while we have his counsel admitting the conference by his very attempts to show that at that conference Bole disclosed the invention to Wilson. As to these matters see testimony of Willard [Tr. p. 322]. As to Bole's denial of such conference, see Tr. pp. 499 and 571. Which is the court to believe, the appellee Bole or his counsel? In other words, whose appeal is being urged, that of the appellees or the appeal on debate of their counsel?

Appellees' Brief, page 17:

"The defense rests on the impeached testimony of Mr. E. C. Wilson."

We have hereinabove in detail shown that the party Wilson's testimony is corroborated. It would be difficult to imagine any better corroboration after the considerable lapse of years than we find in this case, particularly in dealing with the question of invention.

Appellees' Brief, page 17:

"We have only the testimony of Mr. E. C. Wilson that he conceived this invention before this conversation."

The same observations apply as to this statement.

Appellees' Brief, page 19:

"The fact that he, (W. W. Wilson) testified that there was no contract in writing in settlement between the Wilson & Willard Manufacturing Company and Mr. Bole in 1913"

The testimony [Tr. p. 291] which is quoted from the interference record is to the effect that a receipt was given to Bole for payment which he made at that time. It is a matter of legal conclusion whether that receipt was a mere naked receipt or a settlement.

Appellees' Brief, page 20:

"While W. W. Wilson has the impression and attempts to state positively that his brother, E. C. Wilson, had several sketches in his hand of different shapes of keys at this time, Mr. Wilcox point-blank says there was only one that he saw." [Tr. p. 294.]

See testimony of Wilcox [Tr. p. 243], which in a measure corroborates, quite contrary to contradicting, the testimony of Wilson and his brother:

"It was only a few days after I heard little bits of conversation in regard to the letter that I saw some *sketches* of a key."

"Q. Under what circumstances did you see those sketches?"

"A. Mr. E. C. Wilson and Mr. R. E. Bole and Mr. A. G. Willard were standing at a desk, used for a shipping clerk's desk."

Appellees' Brief, page 20:

"Mr. Wilcox testifies that he was not a party to the conversation at all and that after Mr. E. C. Wilson turned away from the shipping desk with the sketch in his hand and said to Mr. Bole, 'Oh, I know how to get it in there, but I don't know how to get it out,' etc."

Mr. Wilcox does not testify positively that he was not a party to that conversation. See testimony [Tr. p. 253]:

“Q. Do you now *think* that you took part in this conversation with regard to the sketch of the single-piece key? A. At that time?

“Q. Yes. A. No, sir.”

This is merely another turn of phrase of appellees’ counsel converting a mere doubt by Wilcox into what he wishes to make positive testimony in his favor.

Appellees’ Brief, page 21:

“Mr. Wilcox says he took no part in the conversation whatever.”

This is a repetition of the same erroneous construction upon the testimony of Wilcox.

Appellees’ Brief, page 21:

“But there is a total failure of any testimony whatever by either Mr. Wilcox or W. W. Wilson which will deny that the sketch had been made by Mr. Bole or that will establish that the sketch had been made by E. C. Wilson.”

There is strong corroboration of Wilson’s testimony as to the making of this sketch in the portions above pointed out in which it is seen that Wilcox says that:

“Mr. Wilson had a piece of yellow paper in his hand, and a pencil.” [Tr. p. 248.]

Certainly the burden of proof being on Bole, we must look to him (but we look in vain), for any proof that

he made any sketch at any time as to this invention and showed it to Wilson.

Appellees' Brief, page 21:

“There is a total absence of any corroboration of E. C. Wilson's claim that he made the sketch or that he explained the invention to Mr. Bole at this ‘mythical conference.’ ”

See testimony of W. W. Wilson [Tr. p. 273]:

“And so I stepped up to the conference and saw there my brother had a sketch on one piece of paper, or several sketches on two or three pieces of paper, showing different types of keys. He was explaining that the old—He did not want to use the old two-piece key, but that he had gotten up several different designs of keys that could be used in this reamer.”

This certainly is a corroboration of E. C. Wilson's testimony on this point.

Appellees' Brief, page 25:

“If he (Bole) was satisfied to permit Mr. Wilson to thoroughly try out the invention before settling with him on a royalty, he had a perfect right to do so.”

We have previously pointed out that Bole is not shown to have had any invention which he could permit Wilson to use, and particularly not having any patent, he had no monopoly and therefore his permission was not necessary to be obtained.

Appellees' Brief, page 26:

“The relations were those of joint interest in the manufacture and sale of the Bole pump,”

There is nothing in this record to support any such joint interest. The entire showing is that Wilson alone was interested in the reamer matters at the shop and that Bole was simply a customer of Wilson's company in that that company manufactured his pumps for him.

Appellees' Brief, page 26:

"Mr. Bole was not in financial condition to manufacture under-reamers"

It is plain from the evidence in this case that Bole did not need to manufacture an underreamer to try out the invention, as all that was necessary for him to do was to make up a key, which was an easy and inexpensive blacksmithing job, and then try it out in one of the defendants' underreamers, which was built for the use of the two-piece key. There never was a more simple proposition in trying out an invention than that offered in this case, as it required no alteration of any of the other parts of the reamer in order to use the single-piece key in place of the two-piece key. We pointed out in our opening brief that the witness Adams stated in the repair work at Maricopa two-piece keys were made for Wilson reamers, and the making of a one-piece key was even a more simple job than the making of a two-piece key. The question of expense was not to be considered anyway.

Appellees' Brief, page 26:

"no testimony of any other person than E. C. Wilson himself, tending to show any knowledge, on the part of any of the witnesses produced on behalf of the defendants, whether Mr. E. C. Wilson was the originator

of this invention or whether he made the sketch which he is alleged to have had during this conversation of February 3, 1911,”

We have already elaborated upon the fallacy of this contention, and shown how thoroughly Wilson is corroborated by Willard and W. W. Wilson and Wilcox in these particulars.

Appellees' Brief, page 27:

“And Mr. Knapp was not there.”

(at the conference of February 3, 1911.) Mr. Knapp does not testify that he was not present. He simply does not remember being present [Tr. p. 235]:

“I don't remember being present at any conference of that kind.”

E. C. Wilson, W. W. Wilson and C. E. Wilcox all testify that he was present. What probably had superseded the impression of that conference in Knapp's mind was the making of the sketch by Wilson on the palm of his hand the same day or within a day or two, whereby Knapp was instructed as to making underreamer 120 and supplying the single-piece key. In other words, Knapp apparently remembers what occurred this same day about this key, but remembers the more important matter concerning the instructions he received.

Appellees' Brief, page 29:

“From his testimony on cross-examination he would have us believe that this conversation in which he says Mr. Wilcox and his brother Mr. W. W. Wilson, took

part, took place before they (E. C. Wilson, A. G. Willard and Mr. Bole) went to the shipper's desk."

Such is not the testimony [see Tr. p. 172]:

"I don't remember whether they were there at the first or not."

Also see testimony same witness [Tr. p. 171]:

"Q. Were you, Mr. Bole and Mr. A. G. Willard at that shipper's desk prior to turning to the under-reamer, and prior to your making the remark with a sketch in your hand, that you saw how the single piece key could be gotten into the reamer, but did not see how it could be gotten out, or words to that effect, and Robert E. Bole spoke up and said, 'Pry it out'?"

A. I think not.

Q. By Mr. Lyon: Are you prepared to state positively that you were not there?

A. I am prepared to state positively that the *first time* I said that I did not see how I could pry it out was before we went to the table, before we went to the desk."

This makes it quite clear that, as Wilson has stated, he probably made that observation several times, namely, before and after going to that shipper's desk.

Appellees' Brief, page 29:

"he says that it was in the latter part of the conference that A. G. Willard, Mr. Bole and he were at the shipper's desk and that they were not, prior to the conversation which he repeated, together at this shipping desk discussing anything or making any sketches."

As to this see Tr. pp. 168, 169, in which it will be found this witness was questioned with a limitation to *both* discussing and making sketches. He answers naturally in the negative, which is in accordance with his testimony that he made no sketches at that desk. It is evident that there may have been discussions at that desk relative to prying out the key without any sketches being made.

Appellees' Brief, page 30:

"Then he says that Mr. Willard, Mr. Bole, Mr. Knapp, and his brother, W. W. Wilson, were present when the talk started."

This is not according to the testimony, as see Tr. p. 167:

"Q. Who was present when that talk started?"

A. Mr. Arthur G. Willard, Mr. Robert E. Bole, and I believe Mr. Knapp and Mr. W. W. Wilson."

It is to be noted that Wilson did not state positively that Knapp and his brother were present in the beginning. It is evident that counsel is trying to pile up inconsistencies where none exist.

Appellees' Brief, page 30:

"He does positively state that after they had been discussing the matter a little while he asked C. E. Wilcox about it."

This is another mistake of the testimony. See Tr. p. 167:

"Q. Did you invite him to take part in the conference?"

A. I don't remember whether I invited him to or not. I think if I remember rightly he came up after we had been discussing the matter a little while and I asked him about it.

Q. Did he make any remark of any kind during that alleged conference?

A. I don't remember whether he did or not."

It is seen that there is no positive statement in this respect, but only a recollection, which might have been in error, and it is not a material detail anyway.

Appellees' Brief, page 30:

"He testifies, [Tr. p. 168] that he does not remember whether they were at the shipping desk before the conversation which he detailed took place."

That is not the testimony. The questions and answers are as follows:

"Q. At what time during that conference were you, A. G. Willard and Robert E. Bole at the shipper's desk?

A. Probably the latter part of the conference.

Q. Were you not there before going over to the underreamer?

A. I don't remember.

Q. Prior to the conference taking place, at which you took part, A. G. Willard took part, Robert E. Bole took part, your brother, W. W. Wilson, took part, and you think C. E. Wilcox took part, and Knapp you think was present,—prior to that conference at this underreamer were you with Robert E. Bole and A. G.

Willard at this shipping desk discussing and *making sketches*?

A. Prior to the conversation?

Q. Prior to the conversation that you have referred to.”

A. No, sir.”

This testimony is not one of doubtful memory, but is positive to the effect that Wilson was not at that desk prior to that time, discussing and making sketches. As seen above, Wilson admits that he may have been at the shipping desk prior to these conversations. The point is that Wilson insists he made no sketches at the shipping desk at that conversation. His testimony is consistently that he had these sketches when he came to the conferences, as above pointed out.

Appellees' Brief, page 30:

“Then again in the next breath he states positively that he was not at the shipper's desk prior to such conversation.”

The same observations and testimony apply here. This is a wilful misrepresentation of Wilson's testimony, and Wilson only stated he was not discussing and *making sketches at the shipper's desk prior to such conversations*. Counsel clearly garbles the testimony to construct another piece of distorted evidence. See also Wilson testimony [Tr. p. 171]:

“I am prepared to state positively that the *first* time I said that I did not see how I could pry it out was before we went to the table, before we went to the desk.”

Again we reiterate that it is evident that Wilson made the prying out remark before and after going to the desk and may have made it a number of times.

All of this line of testimony thoroughly contradicts counsel's contentions that the testimony of Wilson and of W. W. Wilson and Wilcox is not consistent in regard to the time when this prying out conversation took place, namely, whether before or after Wilson, Bole and Willard went to the shipper's desk. This prying out remark was doubtless repeated a considerable number of times, as that question of removing the key was one of the vital topics of the conversation. Wilson had completed the invention of this key and several other forms and was simply getting the expressions of his shop people as to the relative merits thereof and as to how this particular key could be removed when once in place, or as to possibly trying out one or more of such keys in reamer 120. He tried out this single-piece key and found it so satisfactory that he never had to try out any of the others.

Appellees' Brief, page 31:

"And this discrepancy exists in regard to every fact save and except that Mr. E. C. Wilson admitted after there had been this conversation that he did not know how to get the key out."

We contend that there are no essential discrepancies. The point is that Wilson had one or more sketches at that time and that Wilcox and W. W. Wilson saw them and there was a discussion about prying out the key, and that is all that is necessary to be proven to support

appellants' contentions of disclosure with sketches at that date, including disclosure to Bole. We have shown that W. W. Wilson testifies that Wilson was explaining different designs of keys and that he, Wilson, had been working on those designs of keys prior to the conference. [Tr. pp. 273 and 293.]

Appellees' Brief, page 31:

"Is it not a fair inference to draw that if any such conversation ever took place, the sketch which Mr. Wilson held in his hand at that time was a sketch which Mr. Bole had made?"

What is there to support any such inference? No one testified that he saw Bole make any such sketch, or that he had any such sketch at this time, and Bole *denies that he was present at any such conference*. At no place in the record does Bole testify that he ever furnished any sketch for Mr. Wilson. If Bole had been explaining that sketch instead of Wilson, Bole would have had it in his hand and would have been the man to have been seen by Wilcox with the pencil in his hand. On the other hand, Wilcox states that Wilson had the sketch in his hand and had the pencil in his hand. Wilson has proved that he had been working on that and other designs of keys for several days prior to that, and Bole at no place in the record makes any contention of having worked on any key design prior to that time excepting in 1908, the January 27, 1911, sketch being for a key-remover and not for a key design. There is the hole in the case through which all of the substance of Bole's conten-

tions must leak out, namely, that at this very time when the key matter was uppermost in the shop Bole made no contentions in the one piece of evidence he produced pertinent to such period, that he was claiming anything pertinent to the key, this alleged sketch showing that he was claiming a useless key-remover. Certainly no sane man would make a sketch to perpetuate the one thing of two which had no value if he could lay claim to the other of the two things which was the thing essentially of value.

Appellees' Brief, page 32:

"It is admitted that Mr. Bole knew how to remove such a key and it is admitted that Mr. Bole disclosed how to remove the key."

Bole is shown to have done nothing more than to suggest prying the key up and driving it out. His failure to remove the key in the court room with the tool which he says he devised proves conclusively that he did not know how to remove the key. It is to be borne in mind that he is supposed, from his own testimony and that of Heber and Adams, to have known the proper way to remove the key in 1908, namely, to *wedge it up and pry it out, which Houriet found to be the proper method.*

Appellees' Brief, page 32:

"Yet it is on the testimony of the defendant E. C. Wilson alone that the defendants must rely to prove that E. C. Wilson was the originator of this invention."

This has been gone over very thoroughly hereinabove, in pointing out the corroboration of Wilson as to his testimony in these respects.

Appellees' Brief, page 34:

"Mr. Knapp, called by defendants and employed as foreman in defendants' shop, says: * * *"

Counsel makes a misstatement here, and must have known it, as the testimony of Mr. Knapp that he was an employee of the defendant corporation at the time he testified in this case, is as follows:

"Q. You are not connected with them at the present time, are you?

A. No, sir." [Tr. p. 199.]

Appellees' Brief, page 34:

"Mr. Bole testifies that he made the sketch of the single-tee key that the workman used. Mr. Rydgren testifies he had a sketch."

As to this, see testimony of Mr. Knapp [Tr. p. 210]:

"Q. Did you receive instructions as to the making over of this reamer No. 120 from anybody other than the defendant, E. C. Wilson? A. No, sir."

"Q. [Tr. p. 209.] To your knowledge did Robert E. Bole, the complainant in this case, give any instructions or assistance by any act or word of mouth in connection with making over reamer 120 to include the single-piece key? A. Not to my knowledge."

See also testimony of Houriet [Tr. p. 474]:

"Q. From whom did you receive your instructions for making such key? A. Well, the key was brought to me by the foreman, as near as I can remember."

The transcript at page 689 shows that Rydgren, the blacksmith, who testified that he made all of the first single-piece reamer keys, was prevented by the court from testifying whether or not Bole gave any instructions to him at any time for making any such single-piece key. We contend that it was error of the trial court not to permit this material testimony. We attempted to clear up this matter of the sketch which Rydgren says he had, but were not permitted to do so. It is to be noted that Knapp and Houriet completely showed Bole was no source of information regarding the making of this first key.

Appellees' Brief, page 35:

"It is significant of the utter unreliability of his testimony, and doubtless so impressed the trial court, that this shop order does not in any manner refer to this key. The shop order reads as follows:" etc.

In the first place, we have pointed out that this key, being of simple design, was readily sketched by Wilson on the palm of his hand with a pencil for Knapp, the foreman, as Knapp testified, and there is the further reason that there was no sketch of the key attached to the papers of order No. 6904 for making over reamer 120, namely, that nothing in the record makes it appear that Wilson had *finally* decided, the day this order was made out, exactly which form of key he would use. He therefore instructed Knapp to first make up a single-piece key that he sketched on his hand for Knapp, the sketch of the key finally adopted to be added to the order. *And this was done.* On April 22,

1911, Knapp made an outline sketch of the single-piece key made for reamer 120, after it was thoroughly tried out and the method of removing it discovered by Houriet; and that sketch is in evidence and is part of the record of the order No. 6904. So this order does contain a sketch of the key which was made as soon as it was finally determined to use this key and to ship it with reamer 120. This drawing is part of defendants' exhibit "Wilson Exhibit Wilson Reamer Tee and Key Sketch of 1911," shown at transcript page 814. This is the key that was adopted, and the key that Wilson told Knapp first to make. The point is that the finally completed order included such a sketch of the key, and it is immaterial that the first sketch that Knapp had was only drawn upon the palm of Wilson's hand. Certainly Bole had nothing to do with giving this information. There would have been no sense in trying to specify this key in the typewritten instructions of the order No. 6904, inasmuch as, until the particular form of key had been definitely decided upon, the instructions were to be sufficiently flexible to cover such trial of keys as seemed necessary. These orders are matters of permanent record, and it would have been improper to file a specification of the key until the key had actually been decided upon as to its particular form. It must be remembered that this was in a way experimental work, and the shop order covered those parts which it was actually known could be used and which were not experimental. Thus it is seen that the omission of this key from the typewritten part of this order as originally made out is not fully ex-

plained upon possibility, but upon logic and reason and upon proper shop practice.

Appellees' Brief, page 35:

"The sketch for the 'Extra Heavy Slotted Tee of New Type' is shown on page 803 of the transcript and numbered 7056."

This extra heavy slotted tee is thus admitted by counsel for appellees to have been a part of the order given by Wilson. It will be seen that Bole originally claimed to have invented this extra heavy slotted tee back in 1908, although now in this case Bole lays no claim to having devised such heavy style of tee-bar, which, as we have shown, was essential to the use of any key device in order that there should be sufficient strength in the tee. Bole's testimony, originally given, as at transcript page 592, is as follows:

"As I went along in the letter I described the new style reamer and with each description I drew a sketch. I drew a sketch of this key and drew a sketch of the *tee-bar*, and *showed him how he could make it heavier than the old style, or the one that had broken all the time and gave them the trouble.*"

Now, in direct denial of his own party's claim to the invention of such tee or suggestion of such larger tee, we have counsel's statement, at appellees' brief, page 36, as follows:

"In making out shop order No. 6904, Mr. Wilson was only endeavoring to produce *his* 'heavier and stronger' slotted tee."

Thus, Bole having changed his position originally taken in the interference when he comes to testify in the present case, counsel shifts his position with him and, in effect, denies the testimony given by his own party in the interference. Therefore, if counsel has been forced to discard his party's claim to the invention of the tee as originally testified to, how can this court believe Bole's contention, through counsel's mouth, that Bole was the inventor of the key? It would be consistent for this court to disbelieve Bole in regard to the key, inasmuch as his own counsel has come to disbelieve him in regard to the heavier tee.

This heavier slotted tee is shown on transcript page 803 by sketch, the same being admittedly a sketch of Wilson's. Knapp and Wilson both testified that this is Wilson's original sketch, the first sketch made of the heavier slotted tee. Defendant's testimony was so convincing that Bole felt it wise to lay aside the fabrication of his interference testimony as to this tee, and to stick strictly to the key contention. If Bole had invented any such tee, why didn't he make a sketch of it and why was not some sketch made of it at about the time he says he made a sketch of the key-remover on January 27, 1911? Bole contends that he made certain drawings for the shop in 1911, but nobody remembers them, nobody produces them, and they are not shown in any manner to have influenced anybody in making over reamer 120. On the contrary, everybody permitted by the court so to state says that the instructions came from Wilson through the foreman Knapp. As to any papers that Bole contends are sus-

piciously missing from the files of the Wilson & Willard Manufacturing Company, we have to repeat that Bole, with his proved access to the records of the shop during the period from 1908 to February 1, 1913, might, if he were willing, explain to us the disappearance of the same. While preparing his little plot, as we contend, with his chums of Maricopa to back him up on the 1908 assertions, and with his foreman Naphas to back him up on the 1911 allegations, he doubtless did not overlook the wisdom of putting out of the way anything which might conflict with the proper development of his plot. Again we repeat that it was a most remarkable thing for Bole to do, if he did so do, namely, to leave in the hands of Wilson his (Bole's) entire record of anything he may have invented about this reamer, particularly when Wilson was building up the good will and right attaching to the use of the invention.

Appellees' Brief, page 36:

“Neither Mr. Knapp or any other of the workmen even pretends he has any recollection as to these facts of the remodeling of reamer 120 *except as shown by the time slips and shop orders.*”

This is not a correct statement of the testimony, as they had to refer to the time slips only for the purpose of refreshing their memories as to dates. The testimony clearly shows that the other circumstances and occurrences in connection with the Wilson reamers, keys therefor, and the remodeling of reamer 120, were

matters of clear, unwavering recollection. For instance, see testimony of foreman Knapp [Tr. p. 232]:

“The Court: The objection is sustained. Mr. Witness, do you remember this reamer 120 being in the shop?

A. Yes, sir.

Q. You distinctly remember that?

A. Yes.

Q. And you made it over?

A. Yes, sir.

Q. You distinctly remember that?

A. Yes, sir.

Q. But you don't have any recollection as to the date in regard to when that work was done except as indicated to your mind by these slips?

A. Yes, sir, which I have O. K.'d.

Q. Have you any independent recollection?

A. No, sir.

Q. You testify, then, from what these slips indicate to your mind is the date when that work was done?

A. Yes, sir.

The Court: I think that makes it clear.”

As to Rydgren, it cannot be found that any question was put to him as to whether or not he had any recollection of the key reamer work independently of the shop orders or the time cards. His testimony was clear and positive, as was also the testimony of Houriet. It is quite natural that these employees would need to refer to the time cards, etc., to verify *exact dates*,

when certain specific things in their extensive shop experience were done. No living man could remember such dates in any other way, in the ordinary course of human conduct.

Appellees' Brief, page 36:

“No explanation has ever been offered by Mr. E. C. Wilson of the total silence of shop order #6904 as to this particular key invention which was, according to his testimony, the impelling motive for remodeling reamer 120.”

Again counsel misrepresents the testimony. Wilson has repeatedly testified, as [see Tr. p. 105]:

“I went over to a draughting board and myself laid out one of the tees of the slotted type, increasing its size and giving it the size I discovered when I commenced to work on it myself that it could be made. I was surprised to find that it was fully twice as strong as those we had made when that type of reamer was being made by our plant and by the Bakersfield Iron Works. *I then made up my mind that I could go back to the slotted tee type, using the larger proportions of tees.* With that idea thoroughly settled, I checked up by comparing my figures with those of my brother's. We went over them very carefully at that time, January 26, 1911, and *I then made up my mind that it was possible to make a single-piece key which might overcome a few of the minor troubles we had had with the double key type. The double key type was a success with the exception of the tee and possible occasional trouble had by the plug which held half of the double-*

piece key in place, when it would rust and stick and sometimes cause trouble to remove. But was really a minor trouble with that key.”

It will be quite clear from this testimony that the impelling motive was to return to the preferable slotted-tee type of reamer with any key which could be suitably used, and that, therefore, “the impelling motive for remodeling reamer 120” was to return to this slotted-tee type, which return opened up again the question of the means for confining the lower end spring, and that, therefore, the selection of the new key was the second occurrence in point of procedure and *grew out of the decision to return to the slotted-tee type.*

Appellees’ Brief, page 37:

“Yet no mention of the single-piece key was made to the brother, W. W. Wilson, when so discussing the changes in the tee and the rebuilding of the reamer.”

This statement is squarely a false summary of the testimony of W. W. Wilson, which is as follows [Tr. p. 272]:

“A. As I remember it I asked Mr. Wilson whether or not he would use the same kind of a key he used in the old reamer, *and he said no, he was going to get one up with a single piece.* He thought it would not give the trouble of wedging against the plug.”

Appellees’ Brief, page 40:

“Mr. Knapp testified in the case. *He was still in Mr. Wilson’s employ,* and we have a right to expect his

testimony would be as favorable to Wilson's story as possible."

Mr. Knapp was not in the employ of Wilson when he testified in this case. See Knapp's testimony [Tr. p. 199]:

"Q. You are not connected with them at the present time, are you?

A. No, sir."

This is a direct misrepresentation of testimony on appellees' part.

Appellees' Brief, page 40:

"His cross-examination demonstrates conclusively that he has no recollection either of the work done or the dates except as these appear on the time slips."

The testimony clearly refers to the fact that the witness had only to refer to the time slips in regard to specific dates. It is an absolutely false statement that the witness had no recollection either of the work done or of the dates. He had very positive and clear-cut recollections of the work he had, and so testified.

Appellees' Brief, page 40:

"He makes a positive misstatement of the work he did."

A careful inspection of Houriet's testimony will fail to reveal any misstatement of Houriet as to the work he did. No specific reference is made to the testimony to support such slur.

Appellees' Brief, page 40:

"He is contradicted and impeached as to such work by the sketch of the slotted tee, [Tr. p. 803] and by the testimony of the foreman, Knapp."

It is to be noted that this is merely an unsupported slur of the testimony, without any reference to the transcript to substantiate it.

Appellees' Brief, page 40:

"He is impeached and contradicted by the testimony he gave in the Patent Office interference."

This again is mere mud-throwing argument, and there is no statement as to how any impeachment and contradiction results. We contend that Houriet's testimony is consistent throughout.

Appellees' Brief, page 43:

"Yet we find that there is no testimony of anyone to corroborate E. C. Wilson's testimony that Mr. Knapp told him (Wilson) that Houriet had made this discovery and took Wilson out to see how Houriet was removing the key. The story then rests on Mr. E. C. Wilson's own words. Knapp does not corroborate him."

It is to be noted that Mr. Knapp is not interrogated on that point. At any rate, he does not contradict Wilson, and W. W. Wilson corroborates Wilson in that regard [see Tr. p. 280]:

"Q. And did you see the reamer disassembled and the key removed after the parts had been first put together?"

A. Yes, sir.

Q. How was that done?

A. I was sitting in the office one day and Mr. Knapp came into the office and got myself and Mr. E. C. Wilson and told us to come out into the shop and look at that reamer. He said we didn't need a lever to pry it out. So we went out into the shop, and Mr. Houriet, who was working on the underreamer, had found that—and he did at that time put the underreamer together, and then, with the tang of a file, drove it under one edge of the key and pried it up. He was then enabled to pull the file out and leave the key with the prong sticking up on the edge or corner of the bore; and then he was able to drive the key out the other side. That is the way he dismantled the reamer at that time."

Thus Wilson's testimony is corroborated by W. W. Wilson, and is not denied by Knapp, who was not interrogated on that point.

Appellees' Brief, page 44:

"Mr. Houriet does not remember ever having shown W. W. Wilson how such key could be so removed."

Again Houriet is not questioned on that point, but does say that he demonstrated that operation for many people. For counsel to show that Houriet does not remember this without pointing out any place in which he was asked whether he remembered it is begging the question and distorting the testimony, with an implication that is not founded upon the record.

Appellees' Brief, page 45:

“In this connection it must be remembered that Mr. Knapp does not testify that he called E. C. Wilson's attention to this discovery, nor does he in any manner mention the brother, W. W. Wilson, in this connection.”

Knapp does not contradict Wilson on this point in his testimony, but E. C. Wilson and W. W. Wilson, taken together, make a clear proof of this occurrence.

We have shown that Knapp testified that Houriet came to him and said that he discovered a way of taking the key out with a file. The only witnesses who attempted to upset this discovery of Houriet's are Bole and his former foreman, Naphas. Both of these witnesses are thoroughly contradicted and impeached, Bole being impeached by his own mouth particularly with relation to the alleged thin key which he is supposed to have produced earlier than the key for reamer 120, made under Knapp's instructions. In this connection it will be seen that both Naphas and Bole disagreed entirely as to who was present on the occasion of this alleged prying out of the key by Bole.

Bole testifies [Tr. p. 513] that Houriet, Wilcox, E. C. Wilson, Naphas and himself were present, whereas Naphas testifies [Tr. p. 619] that Bole, Naphas and E. C. Wilson were present, *and no one else*. Which of these two otherwise unbelievable witnesses is therefore to be believed in this instance? This is a much more serious proposition for appellees than the question as to whether Knapp and Willard were present at

the February 3 conference, inasmuch as Wilson is thoroughly corroborated by two witnesses, whereas Bole is directly contradicted by his own witness, and Naphas was found to have been absolutely in error as to even the year that this key removing was supposed by him to have taken place. We have pointed out above that even Bole confuses the year 1911 with the year 1913, even after the court calls his attention to his apparent discrepancy.

In this connection it is significant to point out that order No. 6904 for this reamer showed no time cards turned in by Bole for any work on a key of this reamer or anything else in connection with this reamer No. 120. Had he done any work on this job, the shop orders and time cards would have shown it.

Appellees' Brief, page 47:

“W. W. Wilson, like the other workmen in the shop, had no definite recollection of any of these facts other than as they are shown by the shop records.”

Again the very lengthy testimony of Wilson shows that it was only with respect to specific details that Wilson had to refer to the shop records. He had very clear and full recollections independently of the shop records as to all matters of construction, sketches, disclosures, and commencement of reduction to practice of the invention involving the key.

Appellees' Brief, page 48:

“It is passing strange that if W. W. Wilson was a party to the explanation of this discovery by Mr. Houriet to E. C. Wilson, that neither E. C. Wilson

nor Mr. Knapp nor Mr. Houriet remembers W. W. Wilson as having anything to do with the matter, or as having been present.”

As above observed, there is no testimony of anyone to show that W. W. Wilson was not present, and the testimony of Wilson, W. W. Wilson and Houriet and Knapp all fits together to make a strong positive showing as to this first key removing by *wedging up the key*.

Appellees’ Brief, page 48:

“It is to be considered in this connection that the trial court recalled Mr. E. C. Wilson and questioned him in regard to this occurrence and gave him several opportunities to state who was present when he, E. C. Wilson was shown by Mr. Houriet how to remove this key in the manner referred, Mr. E. C. Wilson fails utterly to name anyone except Mr. Houriet who was present, yet it is to be remembered that this testimony was taken in open court; that Mr. E. C. Wilson had heard this testimony given by his brother, W. W. Wilson, and that he knew the purpose of the court was to compare the testimony on this point.”

The examination by the court in that regard was as follows [p. 699]:

“The Court: All right. Mr. Wilson, who first showed you that this single-piece key could be removed with a chisel or a file?

A. Mr. Houriet.

Q. When was that?

A. That was just at the time the reamer was first

completed so it could be assembled; it was some time in the latter part of February, I should judge, 1911.

Q. What did Mr. Houriet remove the key with?

A. He removed it with the tang of a file; he had a piece of a file that he picked off the floor and put the end in one end of it and pried it out.

Q. That was the first time you saw that done?

A. That was the first time I ever saw that done.

Q. How had the key been removed prior to that time?

A. We had removed it two or three times with a lever. When the reamer was first assembled we had fashioned the key so it could be removed with a lever, but later it was changed over and was one which we had in stock for another purpose, and it was not an easy task to remove the key that way, and it was giving me some little concern, always had from the time I had first thought of a single-piece key, and I was sitting in the office and Mr. Knapp came in, very much elated about something, and he said, 'Wilson,' he said, 'we don't need that lever to take that key out of that reamer.'

Q. Who said that?

A. Mr. Knapp, the foreman and I said, 'Well how are you going to do it, William?' 'Well,' he said 'come out and I will show you what Houriet has done.' So he took me out to the shop where Mr. Houriet had been working on the reamer, and Mr. Houriet took a file and drove one end of it underneath the key and drove the key out. I saw Mr. Houriet do that many times afterwards in demonstrating the reamer to

respective customers and people who were there interested in oil well tools.

Q. Well, did you ever see Mr. Bole remove it with a file?

A. I never did.

Q. When did you commence manufacturing these single-piece keys in the business?

A. May or June of 1911.

Q. May or June, 1911?

A. Yes.

Q. Now, during the year 1911 were you manufacturing very many of these reamers with that single key?

A. Yes, sir, we made quite a number of them; yes, sir, after we first adopted them we made them regularly.

Q. Made them regularly?

A. Yes, sir.

Q. And in fact, you abandoned the other style?

A. Yes, sir. We went cautiously at first and found that it worked out so satisfactorily that we could certainly adopt it.

Q. And kept that up during 1912, manufacturing these keys right along?

A. All the time.

Q. All the time?

A. Yes, sir; and still making them.

Q. Yes. Well, during that time, 1911, the balance of 1911 and of 1912, did you manufacture any double-key device?

A. No, sir.

Q. Did you manufacture any other reamer with other means of fastening?

A. I don't believe we made any other block-and-screw or double key type, but we have done so here the last few months.

Q. By Mr. Blakeslee: Which, during the last few months, if I may ask?

A. I believe in December.

Q. I mean which type.

A. Oh, we made some block-and-screw type reamers during December, January, February and March of this year.

Q. They were so ordered, were they?

A. They were so ordered.

“The Court: That is all. Do you want to ask him any questions?”

Mr. Blakeslee: No, sir.”

This testimony certainly does not show that Wilson was reluctant to give any testimony as to any pertinent question. He definitely and clearly answered the questions asked him, and it was probably not assumed by the court that it was necessary for Wilson to go further into the question as to who was present at that time.

As to the discussion by counsel on page 58 of appellees' brief, that Wilson was forced to change his testimony by the production of the Kibele letter of February 28, 1911, and place the time of Houriet's alleged accidental discovery prior to the date of that letter instead of after: we do not find that Wilson has been forced to change his testimony in these par-

ticulars in any respect. Furthermore, Wilson produced this Kibele letter himself originally in the interference, and it was not, as counsel would imply, sprung upon him in order to force him to change his testimony. We fail to find where any shift was made in Wilson's testimony after this letter was made of record. At any rate, the prying up of the key referred to in the Kibele letter was not the wedging up of the key that Houriet did.

In answer to counsel's observations on page 59 of appellees' brief, to the effect that it is significant that defendant did not examine Willard as to the February 3, 1911, conference, it may be stated that, Willard having testified that he did not remember that particular conference, certainly would have made it futile to have examined him in detail about it. As pointed out above, Willard does state that there were a number of conferences about that time concerning this key reamer.

Counsel's contentions on page 59 of appellees' brief, that the deposition in the Patent Office interference between Bole and Wilson is not testimony in this case, and that it was used, and can only be used, for the purpose of showing discrepancies between the testimony taken in that proceeding and in this case, and not as testimony in chief, and that the trial judge so ruled, is apparently not borne out by the record. [See Tr. p. 303.]

Counsel refers to transcript page 303 to support this contention, and to quote such ruling, when, as a matter of fact, the ruling on that page of the transcript

had nothing to do whatsoever with the question of propriety of the use of the Patent Office depositions. How can counsel possibly twist the ruling on that page of the transcript into a ruling pertinent to the propriety of the use of the Patent Office depositions?

All of which annihilation of the straw man which counsel for appellees sets up, namely, the straw man which is supposed to defeat appellants by way of discrepancies and contradictions as between the testimony of appellants' witnesses, goes hand in hand with the annihilation of the straw man set up by appellees to champion their case, namely, the straw man representing the contentions that Bole came in "after the fact" and had something to do with the assembling of a reamer with the key and the wedging of the key out. In other words, counsel has attempted, by garbling the record, to make it appear that the appellees are frightfully mixed as among themselves in establishing Wilson's original and diligent conception, making of sketches, disclosure, and commencement of reduction to practice of the invention of the patent in suit. When the record is *truly* read and interpreted, not falsely read and interpreted, as appellees' brief would handle it, the case of appellants in these respects is thrown strongly into relief and found to be an impregnable defense on that side of the case. Likewise, appellees' attempts to ride in on the back of Wilson's diligence are found to be pitifully lacking in any elements of strength or consistency. All of this campaign of misrepresentation and slurring of appellants' witnesses was doubtless waged to draw the attention of the court

away from those other defenses which utterly control this case, namely, *the burden of proof was shifted to the complainants by the anticipatory fact of Wilson's earlier manufacture, that the burden is imposed upon complainants because of the doctrine of Morgan v. Daniels pertinent to the Patent Office decision on the question of originality and priority as between Wilson and Bole, and the necessity, therefore, of appellees establishing the fact that Bole had this invention and disclosed it to Wilson before Wilson independently did anything in and about the invention.* As the Bole invention is anticipated by the Wilson manufacture, as Wilson is shown to have been the prior and diligent inventor beyond shadow of doubt, and as the Patent Office has so found, the appellees, with the double burden imposed upon them as previously set forth, must prove that Bole previously had the invention and disclosed it to Wilson before Wilson did anything in and about the invention. That appellees apparently admit this cannot be done is shown by the tactics of counsel on argument and in brief, as exhaustively and minutely pointed out hereinabove, and by counsel's apparent withdrawal of contention that Bole had the invention as early as 1908, for that is not brought to the front of the case as a controlling factor. Rather, appellees rely upon attack upon appellants' proofs, coupled with misrepresentation of the record and further supplemented by unsupported contentions that Bole had something to do with the invention "after the fact," namely, with respect to getting the key invented by Wilson out of the reamer after it was put

in. Appellees must have known and realized that with Bole's claims strangled by the estoppel resulting from his failure to speak out if he could have claimed the invention during the 20 months or so that Wilson was asserting his rights to it and taking the field with it prior to the letter of protest of January 17, 1913, it would be useless to try to show this court that Bole had the invention in 1908. In other words, appellees would have simply been pointing out the applicability of this doctrine of estoppel, if they had over-insistently represented to this court that Bole had the invention in 1908. In addition to all this, we have the covenant of Bole to put the invention forever away from him and never in any manner to assert his right to it and thereby or in any manner to harm defendant by reason of any such assertion, as a part condition for the compromise settlement of February 1, 1913. So, particularly in view of appellees' brief and argument, we cannot see that, even when the facts are considered aside from the equities and doctrines of law involved, appellees can prevail, because of estoppel and laches attaching to Bole's attitude and procedure, plus his concealment from Wilson of the invention from 1908 until 1913, if in fact he was in possession of it other than by information received from Wilson. There is the duty of one to speak out when another is invading his rights. This principle involved in patent law is too well established to require discussion or citation of further authorities. The opening brief of appellants discusses this question and the question of

concealment, with authorities, on page 114, the estoppel, of course, being predicated upon concealment.

We insist, however, that this appeal involves several controlling principles of law and equity which the lower court entirely ignored, as reflected by the decision in the case, or at least entirely failed to apply. It certainly cannot be equity of any kind to permit a disgruntled debtor to make away with the good will of his creditor by assertion of a right to an invention upon any such proofs as appellees have brought forth, in the face of such inhibitive laches and estoppel. After all, the whole record shows that Wilson was the logical inventor, the true and original inventor, and the man who gave the invention to the world, and the Patent Office have twice said he is resultantly entitled to a patent for the invention of the patent in suit.

Appellees make some contentions, direct and implied, on brief and argument, that the judgment of the Patent Office is not final in that appeal has been taken in the interference matter by Bole. Counsel is misleading with respect to the use of his term "judgment," for he well knows that the only "judgment" rendered is that recorded in the opinion filed, and that under the Patent Office rules automatically the procedure of rejecting or allowing the applications of the parties involved in the interference takes place; the successful party, if the application is still pending, being granted a patent, and the unsuccessful applicant being denied a patent as to the subject-matter of the interference. In the present case the Patent Office has twice said Wilson is entitled to the patent, which is tantamount

to saying that Bole improperly received a patent, and unless the Commissioner of Patents shall reverse the two lower tribunals who have decided in favor of Wilson, and unless the final tribunal in the Patent Office forum, namely, the Court of Appeals of the District of Columbia, shall find upon appeal for Bole, a patent will issue to Wilson which will be just as good a patent as the patent issued to Bole and Double, and it will *not* be necessary for Wilson to proceed under section 4918 to cancel the Bole patent unless he so desires, but he can utilize his monopoly unhampered, until such time as the prior Bole patent which the interference proceedings determined were improperly issued to Bole, be raised or asserted against him, and Wilson desires to have it eliminated from the field and takes proceedings under said last mentioned section in that direction.

It is interesting to note in this connection that in *Morgan v. Daniels*, which, in spite of counsel's efforts to befog the issue, was the final determination of a contest as to priority between the parties, and which contest had been decided by the Commissioner of Patents in favor of the party whom the Supreme Court upheld, the Supreme Court found in support of the findings of the *Examiner of Interferences*, the lowest tribunal of the Patent Office in these interference matters which are conducted pursuant to the provisions of the Revised Statutes, section 4904. Therefore, this court in the case at bar is only asked to find in accordance with the findings of this same tribunal, reinforced by the findings of the next higher tribunal, the Board of Examiners in Chief;—

in other words, merely to endorse the findings of that tribunal in the Patent Office which the Supreme Court of the United States endorsed in *Morgan v. Daniels*, and in so doing likewise to endorse the findings of the Board of Examiners in Chief, the next higher tribunal. In *Morgan v. Daniels* there had been a reversal of the Examiner of Interferences by the Board. In the case at bar, as to the interference between Bole and Wilson, the Board has affirmed the findings of the Examiner of Interferences that *Morgan v. Daniels* arose under U. S. R. S., Sec. 4915 is immaterial.

Counsel refers to the presumption of validity attaching to the issuance of the Bole patent in suit. What can remain of any such presumption after the very branch of the government which issued the patent has twice in effect admitted the error of so doing and so hastily and inadvertently doing while the Bole and Wilson applications were co-pending in the Patent Office and prior to declaration of interference? In fact, the position of the Patent Office in this respect is as follows:—it has said that Wilson is the inventor and not Bole, and it has said so each time this issue has been decided, and it has done everything it possibly could do to correct its earlier error and inadvertence. It cannot withdraw or cancel the Bole patent, but in so far as its corrective action can go, it has stamped out the life it originally erroneously infused into the body of the Bole patent.

Counsel on brief and argument has referred to the decision of the Commissioner of Patents rendered September 15, 1915, to stay its interference in Wilson

v. Bole, and has made it appear that such stay was granted because of some tacit admission that the decision of this appellate court would be controlling on the Patent Office. We contend that under section 4904 there can be no control of the Patent Office by any court as to the issues properly to be determined by the Patent Office, and that decision of the Commissioner which is the decision of a federal tribunal on motion, we will now quote from to show that the main ground upon which this motion was decided in favor of Bole was, as clearly indicated, the provision of sufficient time for counsel of appellees to journey to Washington and also to argue the appeal in the case at bar, and also inferentially that the Patent Office might be advised as to the findings of this court as it has of the findings of the Patent Office. It will be noted from this decision that the Commissioner of Patents is to set a day within the present month of October for argument, giving counsel time to come from Los Angeles. This opinion, the whole import of which has been so garbled by counsel, is as follows, being in the matter of Interference No. 37,126, between Wilson and Bole:

“MOTION TO POSTPONE.

This is a motion to postpone the hearing now set for October 11, 1915. It appears that an appeal in a suit by Bole against Wilson, in which the defense of inventorship by Wilson was set up, is to be argued before the Court of Appeals of the Ninth Circuit on October 4, and that counsel for Bole, residing in Los Angeles, wishes to take part of the argument of both appeals.

As the time between October 4 and October 11 is too short for convenient travel from Los Angeles, and the hearing in Los Angeles may not be had on the date set, I will order that the matter be brought on before me on the 11th of October, as now noted. If at that time the appeal in the Court of Appeals of the Ninth Circuit has been argued, or is on the point of being argued, I will adjourn the hearing herein to await the decision of the Court of Appeals. If it has not been argued and is not set for argument on a day certain within the month of October, I will on the 11th set a day within the month of October for the argument before me, giving counsel time to come from Los Angeles.

(Signed) THOMAS EWING,
Commissioner.

September 15, 1915.”

Counsel would make it out that the mere taking of an appeal from the decision of the Board of Examiners in Chief of the Patent Office nullifies the effect of such finding. This is not so. The findings stand in full force and effect until a reversal has been made. In other words, on the records of the Patent Office now, Wilson is the party entitled to a patent for the subject-matter of the Bole patent in suit. That this is the law in federal procedure, see

Norton v. Taxing District of Brownsville, 36
Fed. R. 99, 2nd syl., and p. 100, at bottom, and
p. 101, at top, and p. 102, line 11, to end of
opinion.

The contention has been raised that no exceptions were taken at the trial. Rule 46 is apparently the only one of the new equity rules concerning exceptions,

and that only refers to evidence offered and excluded. This rule is not brought particularly into play on any of the grounds of error urged in appellants' assignment.

In conclusion, we contend that the misrepresentation of the record and facts in appellees' brief is repugnant to fair play and highly significant and can hardly be explained as being the result of mere carelessness, upon which score it is equally to be condemned. We believe that such misrepresentations on argument and in brief would justify the court in ignoring such argument and brief of appellees in determining the issues in this case. When this court has realized, as pointed out, that Wilson's chief competitor and opponent in extensive litigation, Double, president of the Union Tool Company, involved in such litigation, is one of the complainants in this case, and that Bole rushed to him as soon as he had made a cheap settlement with Wilson and promised to do nothing more about the key matter, and assigned an interest in the key invention of the patent in suit to Double, we believe that the motive and animus behind this dispute will be clearly visible.

Again, appellants respectfully urge that the decree of the lower court be reversed and the bill dismissed, within all good conscience and equity and law, as well as upon the facts of the case.

Respectfully submitted,

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Counsel for Appellants.

